IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 09/07/2002

Coram

THE HONOURABLE MR. JUSTICE M. KARPAGAVINAYAGAM

SECOND APPEAL No.1682 of 1990

A. Arunachalam .. Appellant

Vs.

C. Thangavelu .. Respondent

Second Appeal against the Judgment and decree dated 11.3.1988 in A. S.No.43 of 1987 on the file of the Subordinate Judge of Tiruvellore, reversing the judgment and decree dated 29.11.1987 in O.S.No.400 of 19 84 on the file of the District Munsif of Tiruvellore.

!For Appellant : Mr. M.S. Subramanian

^For Respondent : Mr. T.V. Ramanujam, S.C. for
Mr. T.V. Krishnamachari

:JUDGMENT

The plaintiff is the appellant herein.
2. The suit was filed for the relief of declaration and injunction.
Though the suit was decreed by the trial Court, the same was dismissed by the lower appellate Court in the appeal filed by the defendant. Hence, this Second appeal.

3. The case of the plaintiff in short is as follows:
"Plaintiff's father Annamalai and defendant Thangavelu are the sons of K.T. Chockalingam Mudaliar. He was owning 2.96 acres in S.No.64/3 in Karanai village. On 2.10.1957 he divided the entire properties to these sons and another. In the said partition, the suit S.No.64/3 was divided into two halves and the northern half of 1.48 acres was allotted to the plaintiff's father and the southern half of 1.48 acres was allotted to the defendant. Each share contains the bore well. However, the bore well in the share of property allotted to Annamalai, the palintiff's father, did not yield much water. Therefore, at the intervention of Chockalingam Mudaliar, a portion of the southern half allotted to the defendant was discovered in order to dig bore well for Annamalai. Accordingly, a bore well was dug up and a brick built of 12 feet diameters with sub wells was built and electric motor in S.C.No.359 was installed by Annamalai. The well, bore well, motor, etc. occupied about 4 cents. This extent was delivered by the defendant to

Annamalai by way of exchange. Annamalai, the plaintiff's father gave 4 cents in his share to the defendant. Thus from 1958, the said Annamalai has been in possession and enjoyment of the well, bore well, motor etc. On 9.4.1971, there was a partition between Annamalai and his son, the plaintiff and in the said partition, the suit property along with bore well, motor pumpset, etc. was allotted to the plaintiff. In 1984, when the suit bore well failed to give adequate water, the plaintiff attempted to dig another sub well in the same well. The defendant prevented the same and disturbed the possession of the suit property. Hence, the plaintiff filed the suit for declaration of title by adverse possession and for permanent injunction."

4. The case of the defendant is as follows:
"There was no exchange of land or portion. The well and sub wells were constructed by the defendant alone in the share allotted to him. Annamalai, the father of the plaintiff obtained permission to use the water in the bore well through pumpset from the defendant with the condition that the defendant should be supplied water from the motor pumpset. The plaintiff has no right in the suit item and he has not acquired title by adverse possession. The motor and pumpset alone belong to Aannamalai and not the bore well. Hence, the suit is liable to be dismissed."

5. On the strength of the above pleadings, necessary issues were framed. During the course of trial, on behalf of the plaintiff, P.Ws.1 to 3 were examined and Exs.A1 to A22 were marked. On the other side, the defendant examined himself as D.W.1 and examined his another brother Kalathi as D.W.2 and marked Exs.B1 and B2. Since the Advocate Commissioner was appointed to inspect and file his report with reference to the identity of the property, he filed a report and plan and the same were marked as Exs.C1 and C2 respectively.

6. On conclusion of trial, the suit was decreed in favour of the plaintiff holding that the plaintiff would be entitled to the title over the suit property only to the extent of 20' x 25' with a well of 12' diameter, two electric motors and pumpset attached to the bore wells with a storage tub, etc.

7. Aggrieved by the said judgment and decree, the defendant filed an appeal before the lower appellate Court. After hearing the appeal, the appeal was allowed and the suit was dismissed. Hence, this second appeal by the plaintiff.

8. When the second appeal was admitted by this Court on 7.12.1990, the following substantial questions of law were formulated:

1)Whether the lower appellate Court went wrong in not properly considering Ex.A17, the partition deed between the plaintiff and his father Annamalai, while the suit properties were allotted to the share of the plaintiff?
2)Whether the lower appellate Court ignoring the admitted pleading and the evidence, especially when the admitted case of both the parties is of actual possession and enjoyment with the plaintiff when the service connection in the name of the plaintiff and his father has vitiated the judgment?

3)Whether the lower appellate went wrong by dismissing the suit on the ground that the suit property is not being properly described when there was no dispute with regard to identity and demarcation of the property?

9. In elaboration of these substantial questions of law, Mr. M.S. Subramanain, the learned counsel for the appellant would point out that the reasonings given by the lower appellate Court in its judgment are not based upon the evidence on record and the lower appellate Court went wrong in misreading the evidence even without considering the reasonings given by the trial Court while passing the decree which are justified.

10. In justification of the grounds on the basis of which the appeal was allowed by the lower Court, Mr.T.V.Ramanujam, the learned senior counsel appearing for the respondent, would submit that Ex.A17 cannot be given any importance, in view of the fact that mere attestation of the document without knowing its contents would not amount to estoppel and that the finding of fact rendered by the lower appellate Court cannot be disturbed lightly in the absence of any substantial question of law, which has not arisen in this case.

11. To substantiate the above plea, he would cite the decisions in KANNAPPAN v. PARGUNAN (2000(II) CTC 219), wherein it is held by this Court that mere attestation by one of the parties will not confer any title on the party and SANTHOSH HAZARI v. PRUSHOTHAM TIWARI (2001(I) CTC 505(S.C.)), wherein it is held that the First Appellate Court is a Final Court of Law and its decision on question of Law and the finding of fact even if erroneous cannot be challenged in second appeal.

12. I have given my anxious consideration to the respective submissions made by the counsel for the parties.

13. Before delving into the merits of the contentions urged by the counsel appearing on either side, we would refer to the reasonings of the lower appellate Court, which disturbed the finding of fact given by the trial Court, which are as follows:
1)Even though the relief of declaration has been sought in the suit, such issue was not framed by the trial Court and even in the absence of the said issue, the trial Court gave the relief of declaration to the plaintiff.
2)Ex.A17, the partition deed between the plaintiff and his father, by which it is stated that the suit property with well, bore well, etc. was allotted to the plaintiff and Ex.C1, the Commissioner's report and Ex.C2, the plan do not tally with the schedule of the property. Therefore, the identity of the property has not been established.
3)Even though the case of the plaintiff is that the 4 cents of land was handed over to the defendant by the plaintiff's father for digging well in exchange of the 4 cents situate in the land of the father of the plaintiff, P.W.2 Chockalingam Mudaliar was not able to give the exact measurements. When there is no document with reference to the exchange and when there is contradiction between the evidence of P. W.1 and P.W.2 with reference to this, the trial Court cannot grant decree in respect of one cent alone.
4)P.W.2 Chockalinga Mudaliar, the father of Annamalai and Thangavelu, the

defendant was not examined in the open Court. On the other hand, he was examined by the Advocate Commissioner appointed by the trial Court only in the house of the plaintiff and therefore, the evidence of P.W.2 cannot be said to be impartial and reliable.
5)When it is the case of the defendant that the plaintiff was permitted to take water through his pump set in the well constructed by the defendant, the plaintiff ought to have raised a plea of ouster. But, the plaintiff has failed to prove that he was in possession and enjoyment for more than the statutory period to the knowledge of the defendant.
6)Admittedly, the well is situated in the land allotted to the share of the defendant. The entire portion around the well has been enjoyed only by the defendant. Therefore, the plaintiff cannot claim adverse possession of the suit well, pumpset, etc. The electricity receipts and the documents show that the pumpset in the name of the plaintiff would not confer title to the plaintiff.

14. On going through the typed set and judgments rendered by both the Court below, it is clear that the findings given by the lower appellate Court are against the evidence available on record.

15. As a matter of fact, the specific plea made in the plaint is the claim for title of suit property only by adverse possession. The relevant portion is this:
"Ever since 1958, the next friend of the plaintiff had been exclusive possession and been enjoying of the suit site as well as the bore well, electric motor and pumpset situated therein as his exclusive property by virtue of his long unintrrupted and continuous use of the suit site, he has prescribed title by adverse possession."

16. On the basis of this pleading, a specific issue has been framed with regard to adverse possession, which is this:
"Whether the plaintiff has title by adverse possession to the suit property?"
Therefore, to hold that the decree has been passed by the trial Court without the plea for title by adverse possession and without the issue relating to adverse possession is nothing but non-application of mind.

17. Similarly, the finding with reference to the identity is also without any basis. The identity has been established by both P.W.1, the plaintiff's father and P.W.2 Chockalinga Mudaliar, who is the original owner and also through Ex.C1, the Commissioner's report and Ex.C2 , the plan. Furthermore, the defendant never challenged the evidence of P.Ws.1 to 3 with regard to the identity of the well and there was no objection by the defendant in regard to the Commissioner's report with reference to the measurements of the suit well mentioned in the plan as well as the report. Under those

circumstances, it is very unfortunate on the part of the lower appellate Court to have held that the identity has not been established which is not the case of the defendant.

18. It is true that the plaintiff's case is that he has been in

possession and enjoyment of the suit property situate in the land measuring about 4 cents. This is mentioned in the plaint as well as the evidence of P.Ws.1 and 2. However, the trial Court rejected the claim with reference to 4 cents, but decreed only in respect of 500 sq. ft. where the well is situated which measures about 20' x 25' and nothing more.

19. Under those circumstances, only on the basis of the particulars regarding the identity of the well which has not been disputed by the defendant, the decree has been passed only for the lesser portion of the schedule property mentioned in the plaint. On going through the plaint, the evidence of P.Ws.1 and 2 and the Commissioner's report and plan, it cannot at all be stated that there are variations.

20. In regard to finding that the plaintiff has failed to prove actual possession for more than the statutory period, it is to be stated that the possession and enjoyment of the well by the plaintiff's family after partition under Ex.A1 has been admitted by both parties. According to the plaintiff, after partition in the year 1957, in the land measuring about 1.48 acres allotted on the northern side to the father of the plaintiff, P.W.1, the bore well situate there did not yield water and therefore, at the intervention of the father Chockalinga Mudaliar, P.W.2, the place was discovered at the western end of the share allotted to the defendant for digging a well so that water can be drawn from the said well to take it to the land situate on the northern side by the plaintiff's father.

21. According to both P.Ws.1 and 2, the well was constructed by Annamalai and after digging up the bore well and installation of the pumpset, the same has been in possession and enjoyment of Annamalai and his family from 1958 onwards. According to the defendant, the well was constructed by the defendant and the plaintiff's father was permitted to take water through his pumpset for cultivating the land situate on the northern side.

22. The statement in the plaint is that well was constructed by the plaintiff's father and sub wells were dug up and the service connection was obtained with motor pumpset only with the expenses of the plaintiff's father. This was arranged by none else than the father of the defendant who is the original owner of both the shares. Father of the said Annamalai, the plaintiff's father and Thangavel, the defendant, Chockalinga Mudaliar himself was examined as P.W.2 in support of the plaintiff's case.

23. Chockalinga Mudaliar is aged about 91 years. Since he could not come to the Court as he was bed-ridden, the plaintiff filed an application to appoint an Advocate Commissioner to examine him in his house. This was stoutly opposed by the defendant. Again, the plaintiff after some time filed another application along with the certificate showing the health condition of the said Chockalinga Mudaliar. This was also hotly opposed by the defendant contending that the father Chockalinga Mudaliar has to be brought to the Court so that he could be cross-examined in detail and only then, truth will come out. This time, this objection of the defendant was rejected and an Advocate Commissioner was appointed to go to the house and examine P.W.2 Chockalinga Mudaliar.

24. Having rejected the objection raised by the defendant for appointment of the Advocate Commissioner and having allowed the Advocate Commissioner to go to the house and examine P.W.2, the Court cannot reject the evidence of P.W.2 on the mere reason that he was not examined in the Court.

25. The deposition of P.W.2 would make it clear that he was thoroughly cross-examined by the counsel for the defendant. The close reading of the deposition of P.W.2, aged about 91 years, would clearly show that there was no necessity to speak falsehood against his own son, the defendant in support of the plaintiff's father. It is his specific evidence that since bore well situate on the northern side allotted to the plaintiff's father did not yield water, one small portion of 4 cents in the western end belonged to the defendant was handed over to plaintiff's father by the defendant at the intervention of Chockalinga Mudaliar in exchange of 4 cents of land situate on the northern side.

26. Though this fact of exchange has not been established through documentary evidence, the fact remains that after partition in 1957, one portion of the land on the southern side was handed over to the plaintiff's father to have his well in order to cultivate the land in northern side. Thus, it is clear that from 1958, the well as well as the bore well, pump set etc. were in possession and enjoyment of the plaintiff's family.

27. The only contention of the defendant is that the well was constructed by him only and not by the plaintiff's father and the plaintiff's father was merely permitted to draw water through his pump set. But, this aspect of the evidence, as correctly pointed out by the trial Court, has not been established by the defendant, in view of the evidence of P.W.2 Chockalinga Mudaliar, who corroborates the deposition of P.W.1, the father of the plaintiff stating that after taking possession of the portion of the land, he constructed the well and bore well and purchased the motor pumpset.

28. Further, Exs.A2 to A16, the receipts for the payment of electric charges for S.C.No.359, are in the name of the plaintiff. That apart, Exs.A18 to A21 are the kist receipts which are in the name of the plaintiff's father. As mentioned above, the ownership of the service connection, motor and pumpset of the plaintiff's father has been admitted by the defendant, though he would deny the ownership of the well.

29. As indicated above, the evidence of P.Ws.1 and 2 supported by P.W.3, a local villager would make it clear that from the year 1958 or at least from the year 1960 as mentioned by P.W.2, the suit property has been in possession and enjoyment of the intiff's family to the knowledge of the defendant and as such, there is nothing wrong in the finding given by the trial Court that the plaintiff perfected his title at least to the extent of 20' x 25', where the well and pumpset are situate, though not 4 cents as claimed.

30. Ex.A17, the partition deed executed between the plaintiff and plaintiff's father has been rejected by the lower appellate Court stating that the reference about the suit well has not been made in Ex.A1 7. This is not

the case of the defendant. As a matter of fact, in Ex.A17 partition deed which was executed in 1971, there is a reference about the well and there is no dispute over the same.

31. In fact, Ex.A17 was marked through P.W.1. When P.W.1 was cross-examined, the defendant did not raise any question with reference to the contents of Ex.A17. On the other hand, D.W.2, another brother of the defendant, would admit that he also signed in Ex.A17, but he did not know contents of the same.

32. P.W.2 Chockalinga Mudaliar also would refer to Ex.A17 by stating that he also signed in the said document showing that the allotment of the suit well in favour of the plaintiff when the partition was taken place between the plaintiff and plaintiff's father in the year 19 71. The perusal of Ex.A17 would show that Chockalinga Mudaliar as first witness, Thangavelu, the defendant as second witness and Kalathi, D.W.2 as third witness have attested the document. In the said document, there is a reference about the suit well.

33. The only point raised by the counsel for the respondent/ defendant before this Court on the strength of 2000(II) C.T.C.219(supra) that mere attestation of document without knowing its contents will not amount to estoppel and the same will not confer any title on the party.

34. This argument would not be relevant to the present facts of the case because Ex.A17 has been marked in order to show that the partition was taken place between the plaintiff and plaintiff's father in the year 1971 not only in respect of the northern side which was originally allotted to the plaintiff's father, but also in respect of the suit well situate on the southern side. This document would show that in 1971, the suit property was in possession and enjoyment of the plaintiff's father.

35. Admittedly, the signatures of the defendant as well as his brother D.W.2 are found in Ex.A17. Though they would contend that they did not know about the contents of the said document, they did not deny their signatures. As noted above, when the document was marked through P.W.1 and when there is a reference about the same by P.W.2, no challenge had been made while they were cross-examined as to the genuineness of the document.

36. Though it is the case of the defendant that they did not know the contents of Ex.A17, it can be taken into consideration in the light of the evidence of P.Ws.1 and 2, to find out whether the suit property was in possession of the plaintiff's family prior to 1971. Under those circumstances, the trial Court is correct in holding that the plaintiff's family has been in possession and enjoyment of the suit property, namely well and other things for more than the statutory period to the knowledge of the defendant.

37. It is settled law that plaintiff can contend adverse possession only when he admits that another person has got title. In this case, the evidence of P.Ws.1 and 2 and Ex.A1, the original partition deed clearly show

that the land on southern side luding the portion of the land in which the well was constructed was allotted to the defendant. Therefore, the title of the land has been admitted. But however, the plaintiff pleads adverse possession of the extent of the land in which the well was constructed and motor pumpset was installed.

38. Exs.A2 to A16 would clearly show that the plaintiff's father has got the service connection in his name right from 1970. As correctly held by the trial Court, if really the defendant was the owner of the well and sub well, he would not have allowed his brother to have the service connection in his name. To say that the plaintiff's father was merely permitted to take water on the condition that the defendant also should be allowed to take water cannot be believed, in view of the fact that the defendant has his own pump set and service connection in the nearby area to irrigate his lands and under those circumstances, the portion of the land was handed over to the plaintiff's father by the defendant for digging up the well at the request of their father P.W.2.

39. The reading of the judgment of the first appellate Court would clearly show that it has not correctly applied its mind to the materials available on record and has reversed the finding of the trial Court by merely stating that the decree has been passed without the plea for adverse possession and with framing of the issue, which is not factually correct.

40. The perusal of the judgment of the trial Court shows that it has extensively dealt with the oral and documentary evidence adduced by the parties for deciding the issues on which the parties went to trial. Without considering the oral and documentary evidence and without verification of the records, the first appellate Court has hastened to set aside the judgment of the trial Court which is a well reasoned one.

41. The Supreme Court would observe in SANTHOSH HAZARI v. PURUSHOTTAM TIWARI (2001(1)CTC 505 S.C.)) as follows:
"The Appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the Appellate Court must, therefore, reflect its conscious application of mind, and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the Appellate Court. ..... While writing a judgment of reversal the Appellate Court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial Court must weigh with the Appellate Court, more so when the findings are based on oral evidence recorded by the same presiding Judge who authors the judgment. ..... Secondly, while reversing a finding of fact the Appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the First Appellate Court had discharged the duty expected of it."

42. If these principles are applied to this case, this Court sitting in second appeal would easily come to the conclusion that the lower appellate Court was not conscious of these two principles and it dismissed the suit on the basis of the surmises and conjectures and also by overlooking the evidence which are available on record.

43. Under those circumstances, this Court would find substantial questions of law which have been formulated by this Court, which are in favour of the plaintiff. Consequently, the judgment and decree passed by the lower appellate Court have got to be set aside and accordingly, the same are set aside and the judgment and decree of the trial Court are restored. Thus, the second appeal is allowed. No costs.

9-07-2002
Index : Yes
Internet: Yes
mam
To
1) The Subordinate Judge, Tiruvellore
2) The District Munsif, Tiruvellore.

M. KARPAGAVINAYAGAM, J.

Judgment in
S.A.No.1682 of 1990